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No. 06-148

In The Supreme Court of the United States

FRED SUTER, *ET AL.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the court of appeals erred in holding that this action should be dismissed under the discretionary function exception to the Federal Tort Claims Act.

II. Whether the district court erred in holding that this action should be dismissed under the misrepresentation exception to the Federal Tort Claims Act.

III. Whether the district court erred in holding that the United States was not liable under the Federal Tort Claims Act due to the lack of analogous private person liability.

LIST OF PARTIES

Fred Suter, Terry D. Suter, Green Meadows, LLC, Paula Totherow, Donna L. Helms, Stephen Miller, Hilda A. Totherow, Ginny Blankenship, Arthur Helms, III, William E. Fowler, Carolyn Fowler, Sidney A. Livingston, Eugene Royals, Dennis Grubaugh, Deborah Grubaugh, James Koenig, Michelle Koenig, Dan E. Holman, Frankie Edmundson, Frank Goodman, Angelo Antonucci, Marshall S. Redding, G. Douglas Hayden, Jr., Claude G. Crisp, Stephen M. Schwartz, Alma B. Schwartz, Dale C. Peters, United States of America.

CORPORATE DISCLOSURE STATEMENT

Plaintiff Green Meadows, LLC is a Delaware limited liability company with its principal place of business in Wake County, North Carolina. Green Meadows, LLC has no parent company and no publicly held companies own any of its stock.

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The opinion of the United States Court of Appeals for the Fourth Circuit in this case is published in the West Unofficial Reports as *Suter v. United States*, 441 F.3d 306 (4th Cir. 2006).

BASIS FOR JURISDICTION

The judgment and opinion of which petitioners seek review was entered by the United States Court of Appeals for the Fourth Circuit on March 28, 2006. Jurisdiction to review the judgment of the Court of Appeals on a writ of certiorari is conferred on this Court by 28 U.S.C. § 1254(1) and 28 U.S.C. § 2101(c), this petition having been filed within 90 days after entry of judgment by the Court of Appeals.

STATUTES INVOLVED IN THE CASE

1. Jurisdiction - Title 28 U.S.C. § 1346(b)

> (b)(1) Subject to the provisions of chapter 171 [Tort Claims Procedure] . . . the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a

private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

2. **Federal Tort Claims Act - Title 28 U.S.C. § 2674**

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

. . . .

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled. . . . .

3. **Federal Tort Claims Act - Title 28 U.S.C. § 2680(a), (h)**

The provisions of this chapter and section 1346(b) of this title shall not apply to -

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a

statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

STATEMENT OF THE CASE

This is an action brought pursuant to the Federal Tort Claims Act (FTCA). Petitioners were victims of a massive securities fraud perpetrated on them by a number of individuals and organizations. Complaint ¶ 1, Appx. at 73a. The activities of this

organized criminal conspiracy were investigated and exposed by the Federal Bureau of Investigation ("FBI"). Complaint ¶ 36, Appx. at 80a. In the course of its investigation, the FBI participated in the criminal scheme itself to such an active degree that it, or some of its agents, profited from the affair and petitioners suffered injury as a result. *Id.* ¶ 39-40, Appx. at 81a-82a.

This governmental participation in crime included helping to set up and run complex corporations that were part of the criminal scheme, the government's agent even serving as Chief Operating Officer for one or more entities in the criminals' organization. Complaint ¶ 46, Appx. at 83a. The government is believed to have contributed to the start-up capital of some of these entities. Complaint ¶ 47, Appx. at 83a. The government engaged in money laundering to cover up the criminal enterprise's crimes, amounting to hundreds of thousands of dollars. Complaint ¶ 52, Appx. at 84a. The government's agent personally profited from these activities. Complaint ¶ 55, Appx. at 85a. From the foregoing, it is evident that the government did not merely set up its own front operation for investigative purposes, but rather it helped the criminals to run *their* operation, to the loss and detriment of many investors.

Petitioners therefore made demand on the FBI for redress in damages, pursuant to the requirements of the FTCA. Complaint ¶ 4-5, Appx. at 74a. That demand was refused by the FBI, *id.*, and petitioners thereafter filed their action in the United States District Court for the Western District

of North Carolina. On motion of the government, the district court dismissed the action, relying on the exception to the general waiver of sovereign immunity in the Federal Tort Claims Act pertaining to fraudulent misrepresentations. Order of the District Court, Appx. at 19a. The district court also held that petitioners had failed to allege a cognizable claim under the FTCA, since a private person could not be liable for negligently conducting or supervising an undercover criminal investigation. *Id.*

Petitioners appealed this judgment to the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit affirmed the judgment of the district court, relying on the alternative ground that the actions of the government were shielded from liability by the discretionary function exception under the FTCA. Opinion of the Court of Appeals, Appx. at 5a-11a.

The basis for jurisdiction in the District Court was 28 U.S.C. § 1346(b), which authorizes civil actions over claims against the United States for money damages arising under the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680. Jurisdiction in the Court of Appeals was conferred by 28 U.S.C. § 1291. This petition seeks review of the judgment of the Court of Appeals by writ of certiorari, pursuant to 28 U.S.C. § 1254(1).

ARGUMENT

I. THE LAW REGARDING THE APPLICATION OF THE DISCRETIONARY FUNCTION EXCEPTION UNDER THE FTCA IN THE CONTEXT OF UNDERCOVER INVESTIGATIONS NEEDS TO BE CLARIFIED AND REFORMED BY THIS COURT

The meaning and scope of the well-known "discretionary function" exception to liability under Federal Tort Claims Act is not well defined. Commentary has noted:

> Unfortunately, it is unclear exactly what falls within the scope of this [the discretionary function exception] provision, despite an immense amount of precedent that has developed on the subject.

14 Charles Alan Wright, et al, *Federal Practice and Procedure* § 3658.1 at 640 (West 1998).

The lack of clarity in the law is particularly troubling in the area of undercover investigations, a matter of primary concern today. On the one hand, there is a need to allow investigating authorities broad discretion in secretly investigating, arresting, and prosecuting crime. On the other hand, without meaningful restraint, this broad discretion can only be abused. Congress has found that "the requirements that criminal investigations and

prosecutions be conducted in a fundamentally fair manner, commanded by the Fifth Amendment, are . . . endangered by the undercover technique as it is being used today," concluding that "the technique pose[s] a very real threat to our liberties." FBI Undercover Operations Report, H.R. Doc. No. 98-267 at 2 (1984) (as quoted in Note, *The Potential Liability of Federal Law-Enforcement Agents Engaged in Undercover Child Pornography Investigations*, 77 N.Y.U.L. Rev. 1090 at 1094-95 (2002)). The harm has been great. "[T]he FBI's use of . . . deceptive practices and the need to avoid discovery have resulted in severe harm befalling totally innocent citizens . . . as a result of careless (even callous) neglect or conscious design on the part of the undercover agents." *Id.*, FBI Undercover Operations at 5, quoted in *Potential Liability of Federal Law-Enforcement Agents*, 77 N.Y.U.L. Rev. at 1095.

The courts have acknowledged that a partial remedy may exist by way of the "*Bivens*" action. *See, e.g.*, *Brown v. Nationsbank Corp.*, 188 F.3d 579, 591 (5th Cir. 1999), *cert. denied*, 530 U.S. 1274 (2002), ("Because the Fifth Amendment due process guarantee against conscience-shocking injury imposes clear limits on law enforcement conduct, we conclude that it was neither necessary nor proper for the defendants . . . to destroy the lives and businesses of innocent non-targets in the name of law enforcement.") But the *Bivens* remedy is hardly adequate to the task. It is limited to private actions against the government agents personally, *Okoro v. Callaghan*, 324 F.3d 488, 490 (7th Cir. 2003) (damages suits complaining about unconstitutional

actions by federal law enforcement officers are governed by *Bivens* if suit is against officers and by Federal Tort Claims Act if it is against United States), who are likely not to be capable of paying a significant judgment.

What is more, the important issue is wrongful conduct by the *government*, not by the individual agent. The failure of the FTCA to remedy serious governmental abuse has had the effect of marginalizing the FTCA, confining it to relatively petty claims, while ignoring greater harms inflicted by the government.

> Surely a statute so long debated was meant to embrace more than traffic accidents. If not, the ancient and discredited doctrine that 'The King can do no wrong' has not been uprooted; it has merely been amended to read, 'The King can do only little wrongs.'

Dalehite v. United States, 346 U.S. 15, 60 (1953) (Jackson, dissenting).[1] Justice Jackson's concerns have been echoed in learned commentary. *See, e.g.*, Walter Gellhorn & Louis Lauer, *Federal Liability for Personal and Property Damages*, 29 N.Y.U. L. Rev. 1325, 1326 (1954) (suggesting that in light of the very broad application of the discretionary function exception, the name "Federal Tort Claims Act" be changed to the "Federal Negligent Operations of Motor Vehicles Act"); Hugh C. Stronswold, *The*

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[1] Justice Jackson was joined in dissent by Justices Black and Frankfurter. *Id.*, 346 U.S. at 47.

Twilight Zone of the Federal Tort claims Act, 4 Am. U. Int. L. Rev. 41, 42 (1954) (discretionary function exception is the "monstrous joker now threatening to engulf the entire Act in a twilight zone—the vague and ambiguous exception from federal liability . . . for 'performance of a discretionary function'"). As Judge Friendly has eloquently stated,

> there is certainly a limit to allowing governmental involvement in crime. It would be unthinkable, for example, to permit government agents to instigate robberies and beatings merely to gather evidence to convict other members of a gang of hoodlums. Governmental "investigation" involving participation in activities that result in injury to the rights of its citizens is a course that courts should be extremely reluctant to sanction. Prosecutors and their agents naturally tend to assign great weight to the societal interest in apprehending and convicting criminals; the danger is that they will assign too little to the rights of citizens to be free from government-induced criminality.

United States v. Archer, 486 F.2d 670, 676-77 (2d Cir. 1973).

The cases construing the discretionary function exception in the context of police undercover work are inconsistent. *Compare Coyne v. United States*, 270 F. Supp. 2d 104, 112-16 (D. Mass. 2003), *rev'd on other grounds*, 386 F.3d 280 (1st Cir. 2004)

(government not immune under discretionary function exception for negligence in exposing identity of informant, noting that "the government's treatment of Coyne's allegations at this broad level of abstraction would enable the discretionary function exception to swallow the FTCA "rule" of liability" and that "the government may not immunize an otherwise tortious action simply by showing that the government took the action in order to implement some policy purpose") *and Liuzzo v. United States*, 508 F. Supp. 923, 931 (E.D. Mich. 1981) (claims that Government through wrongful acts of FBI informant and agents was responsible for mother's murder attacked implementation of FBI's policy regarding use of informants and, thus, such claims were not barred under the discretionary function exception; agent's decision to authorize informant to participate in activities which culminated in murder was not exercise of discretionary function but day-to-day judgment not barred by discretionary function exception) *with Ostera v. United States*, 769 F.2d 716, 718, *reh. denied*, 775 F.2d 304 (11th Cir. 1985) (discretionary function exception applied to render government immune from suit alleging that plaintiff was attacked by FBI informant whose pending criminal state sentence was reduced when FBI decided to use him as informant and that release of informant from state jail system by FBI was done with willful or negligent disregard of informant's vicious propensities).

The concerns of which Judge Friendly raised over thirty years ago remain unaddressed today, as evidenced by the decision of the Court of Appeals at

issue in the case at bar. Opinion of the Court of Appeals, Appx. at 81 (discretionary function exception unaffected by government's participation in the crimes which it was investigating). *See also Ga. Cas. & Sur. Co. v. United States*, 823 F.2d 260, 263 (8th Cir. 1987) (claim for losses caused by FBI's decision to conceal operations of automobile theft ring barred by discretionary function exception; *Frigard v. United States*, 862 F.2d 201, 203 (9th Cir. 1988), *cert. denied*, 490 U.S. 1098 (1989) (suit alleging financial fraud by investment company used by CIA as cover for its operations was barred by discretionary function exception). It is significant that *Ga. Cas. & Sur. Co.* and *Frigard*, both relied on by the Court of Appeals in this case, are distinguishable, in that they had to do with the failure of the government to reveal wrongdoing, and the case at bar amounted to more active governmental involvement in crime, and yet the Court of Appeals here simply cited these cases as dispositive. An authoritative line between necessary governmental secrecy and the phenomenon, alleged in this case, of the government's being in the business of crime has yet to be drawn. The discretionary function exception is implicitly viewed by the courts as to be so broad as to cover *any* governmental undercover activity, no matter how egregious.

This needlessly broad application of the discretionary function exception results in harm to innocent persons, leaving them with no remedy and the government little incentive to restrain itself on behalf of the victims. *See, e.g.*, Note, *Prescott v. United States: The Discretionary Function Exception*

Strikes Again, 74 Ore. L. Rev. 365, 378 (1995) (infliction of radiation poisoning on workers and residents, commenting that "[t]he discretionary function exception has developed into an impenetrable shield behind which the U.S. Government . . . continue[s] to hide. Unfortunately, no relief is in sight for . . . victims."). This is especially so in the context of undercover operations. *See* Note, *The Potential Liability of Federal Law-Enforcement Agents Engaged in Undercover Child Pornography Investigations*, 77 N.Y.U. L. Rev. 1090 (2002) (noting the permanent harm to children who are victims of sexual abuse which present undercover sting operations inflict on them).

The protection of such oppression under the guise of sovereign immunity is unnecessary. It is only by reason of an overly ambitious construction of governmental "discretion" that victims are without redress. As Justice Cardozo declared eighty years ago,

> The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.

Anderson v. Hayes Construction Co., 153 N.E. 28, 29-30 (N.Y. 1926). This Court's intervention is needed in this vital area of the law, in order to draw the line between what is acceptable and what is not on the part of government undercover investigators.

II. THE FRAUD EXCEPTION UNDER THE FEDERAL TORT CLAIMS ACT DOES NOT APPLY TO THIS CASE. [2]

The district court relied in part on the fraud and misrepresentation exception in dismissing the complaint. Order of the District Court of Mar. 1, 2005 at 4, Appx. at 19a. The district court erred. The allegations of the Plaintiffs' Complaint make clear that the government did far more than merely make fraudulent statements to investors. Rather, the government's agent actively helped to run the criminals' extensive operations. The Complaint alleges that:

> The government helped to form Southtech Holdings, Inc. a stock-for-debt merger scam designed by some of the other participants to avoid liability to injured creditors and investors. Agent Vega actually served as the chief operating officer of Southtech Holdings, Inc.

Complaint ¶¶ 45-46, Appx. at 83a;

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[2] The District Court relied in part on the "fraud and misrepresentation" exception to dismiss the Complaint. The Court of Appeals, on the other hand, did not consider this ground, but rather decided the case solely on the basis of the discretionary function exception. Opinion of the Court of Appeals, *Suter v. United States*, 441 F.3d 306 (4th Cir. 2006).

> The government maintained the criminals' corporate office in Ft. Lauderdale, Florida, and brought in money from a number of investors.

Complaint ¶ 51, Appx. at 84a;

> The government assisted the criminals in laundering money derived from its criminal activities, amounting to hundreds of thousands of dollars.

Complaint ¶ 52, Appx. at 84a; and

> The government's agent profited financially from the criminal activities, owning 10% of the business entity he helped to form and spending lavishly.

Complaint ¶ 55, Appx. at 85a.

III. PLAINTIFFS STATED A COGNIZABLE CLAIM AGAINST THE UNITED STATES FOR NEGLIGENCE

The district court also held that a private person could not have been held liable for the government's wrongful actions in this case and that therefore the government could not be liable either. The court held:

> The Act provides that the Government may be sued under circumstances where the United States, if a private person, would be liable to the claimant

> in accordance with the law of the place where the act or omission occurred." 28 U.S.C. §§ 1346(b). Defendant argues that under North Carolina law, a private person could not be liable for negligently conducting or supervising an undercover criminal investigation. This court agrees and dismisses Plaintiffs' negligence claim for lack of subject matter jurisdiction.

Order of the District Court, Appx. at 20a. The district court misapplied the rule. If this were indeed the test for government liability, then liability would rarely attach to the government's actions, because by definition a private person is never in the position of the government. A private person certainly never "supervise[es] an undercover criminal operation." *Id.*

But that is not the test for liability under the general waiver of sovereign immunity in the FTCA. Rather, liability attaches for wrongful conduct committed by the United States

> under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b)(1), and

> in the same manner and to the same extent as a private individual under like circumstances . . .

28 U.S.C. § 2674.

The reference in the FTCA to private parties is intended to refer *by way of analogy* to the liability of private parties, not to mandate that only where private parties could perform precisely the same governmental functions can liability against the government attach. The United States Court of Appeals for the Ninth Circuit has cogently addressed this very issue respecting undercover operations:

> We take explicit issue with the [view] . . . that the Federal Tort Claims Act does not permit a suit for any governmental action taken in the course of an international undercover operation against drugs, because, so the dissent maintains, an individual would never act in "like circumstances", and the government has waived its immunity only as to torts committed by private persons in "like circumstances." Any governmental operation is different from any private action; what is meant by "like circumstances" is analogous circumstances not identical ones. For example, even if no private person ran a lighthouse to aid navigation, the government would be liable for negligently running a lighthouse because a private person would be

> liable for negligently undertaking to help another; the broad analogy makes the circumstances "like"; they need not be "the same." Indian Towing Co. v. United States, 350 U.S. 61, 64-66, 76 S.Ct. 122, 124-25, 100 L.Ed. 48 (1955).

Doe v. United States, 58 F.3d 494, 497 (9th Cir. 1995). *See also Howell v. United States*, 932 F.2d 915, 918 (11th Cir. 1991) (United States could not escape liability under FTCA for negligence in performing uniquely governmental functions such as regulation of flight merely because there is no identical private activity for purposes of comparison; comparison of activities need not be exact, but rather, court would look to closest state law analogue).

In the case at bar, the government's conduct, for which any private party would certainly be liable by way of analogy, included forming and operating criminal ventures, assisting in the running of those criminal ventures, raising capital for criminal ventures, laundering money to conceal its wrongs from its victims, and profiting at the expense of the victims of crimes. Complaint, Appx. at 82a-85a.

CONCLUSION

The question of the application of the discretionary function exception in the context of undercover investigations needs to be reviewed and clarified by this Court. Barring a few decisions providing relief to plaintiffs—made on uncertain grounds--the law as it stands now fails to remedy

even the most destructive governmental misconduct, a situation that could not have been intended by Congress in waiving sovereign immunity in the Federal Tort Claims Act. For the reasons shown, the Court should grant petitioners a writ of certiorari.

Respectfully submitted,

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PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[ENTERED: MARCH 28, 2006]

FRED SUTER; TERRY D. SUTER; GREEN MEADOWS, LLC; PAULA TOTHEROW; DONNA L. HELMS; STEPHEN MILLER; HILDA A. TOTHEROW; GINNY BLANKENSHIP; ARTHUR HELMS, III; WILLIAM E. FOWLER; CAROLYN FOWLER; SIDNEY A. LIVINGSTON; EUGENE ROYALS; DENNIS GRUBAUGH; DEBORAH GRUBAUGH; JAMES KOENIG; MICHELLE KOENIG; DAN E. HOLMAN; FRANKIE EDMUNDSON; FRANK GOODMAN; ANGELO ANTONUCCI; MARSHALL S. REDDING, Dr.; G. DOUGLAS HAYDEN, JR.; CLAUDE G. CRISP; STEPHEN M. SCHWARTZ; DALE C. PETERS; ALMA B. SCHWARTZ,

Plaintiffs-Appellants,

v. No. 05-1521

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of North Carolina,
at Charlotte.
Graham C. Mullen, Chief District Judge.
(CA-04-358-3)

Argued: February 2, 2006

Decided: March 28, 2006

Before WILKINS, Chief Judge, and NIEMEYER and WILLIAMS, Circuit Judges.

Affirmed by published opinion. Chief Judge Wilkins wrote the opinion, in which Judge Niemeyer and Judge Williams joined.

COUNSEL

ARGUED: Emerson R. Marks, Jr., Charlottesville, Virginia, for Appellants. Joshua Paul Waldman, UNITED STATES DEPARTMENT OF JUSTICE, Civil Division, Appellate Section, Washington, D.C., for Appellee. **ON BRIEF:** Peter D. Keisler, Assistant Attorney General, Gretchen C. F. Shappert, United States Attorney, Mark B. Stern, UNITED STATES DEPARTMENT OF JUSTICE, Civil Division, Appellate Section, Washington, D.C., for Appellee.

OPINION

WILKINS, Chief Judge:

Appellants, victims of a fraudulent investment scheme, appeal a district court order dismissing, for lack of subject matter jurisdiction, their action against the United States alleging that an undercover federal agent improperly participated in the scheme. We affirm, albeit on a basis different from that relied on by the district court.

I.

Appellants are victims of a large-scale Ponzi and money laundering scheme that was perpetrated between 1998 and 2001. As the result of an undercover investigation by an FBI agent using the fictitious name "John Vega," a number of the participants in the scheme were successfully prosecuted.[1]

Appellants brought this action against the United States under the Federal Tort Claims Act (FTCA), *see* 28 U.S.C.A. §§ 1346(b), 2671-2680 (West 1994 & Supp. 2005), alleging that the FBI, in connection with its investigation of the fraudulent scheme, "participated in the very frauds which it was investigating." J.A. 15. In particular, Appellants claim that Vega—with the full knowledge of the FBI—"assisted the criminals by helping them to conceal and perpetuate their frauds, which actions drastically extended the scope of the injury inflicted and the number of victims injured." *Id.* According to Appellants, during the course of Vega's undercover investigation, he assisted in the formation and operation of business entities used in furtherance of the scheme. Appellants further claim that Vega and the FBI "profited financially from [Vega's] participation in the crimes which he was investigating," including by acquiring an ownership interest in one of the entities used in the scheme. *Id.*

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[1] Appellants have brought a separate civil action against the perpetrators of the scheme. That action, which is currently pending, is not at issue here.

Count One of Appellants' complaint asserts claims for fraud based on misrepresentations Vega allegedly made to Appellants during his involvement in the scheme and on Vega's assistance in forming and operating entities used in the scheme. Count Two of the complaint alleges that Vega negligently failed to avoid unnecessary harm to Appellants and that the FBI negligently hired and supervised Vega.

The United States moved to dismiss Appellants' complaint for lack of subject matter jurisdiction. *See* Fed. R. Civ. P. 12(b)(1). The United States argued that Appellants' claims were barred by the discretionary function and misrepresentation exceptions to the general waiver of sovereign immunity under the FTCA, *see* 28 U.S.C.A. § 2680(a), (h), and that Appellants had failed to allege conduct by the United States that would create liability under state law if committed by a private person, *see* 28 U.S.C.A. § 1346(b)(1). In support of its dismissal motion, the United States submitted the Declaration of John A. Johnson, a Supervisory Special Agent of the FBI and Unit Chief of the Undercover and Sensitive Operations Unit at FBI Headquarters in Washington, D.C. Attached to that declaration was a copy of the Attorney General's Guidelines on FBI Undercover Operations ("Undercover Guidelines"), which were in effect at the time of Vega's investigation.[2]

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[2] We have held that "[i]n ruling on a Rule 12(b)(1) motion, the court may consider exhibits outside the pleadings." *Williams v. United States*, 50 F.3d 299, 304 (4th Cir. 1995).

The district court granted the United States' motion to dismiss. First, focusing on the misrepresentations that Vega allegedly made to Appellants, the district court held that Appellants' fraud claims were barred by the misrepresentation exception under the FTCA. Second, the district court held that Appellants' negligence claims failed because "under North Carolina law, a private person could not be liable for negligently conducting or supervising an undercover criminal investigation." J.A. 52. The district court did not address the United States' argument that all of Appellants' claims were barred by the discretionary function exception.

II.

We review the dismissal of an action for lack of subject matter jurisdiction de novo. *See Welch v. United States*, 409 F.3d 646, 650 (4th Cir. 2005), *cert. denied*, 2006 WL 452483 (U.S. Feb. 27, 2006) (No. 05-529). In so doing; "[w]e are not limited to evaluation of the grounds offered by the district court to support its decision, but may affirm on any grounds apparent from the record." *United States v. Smith*, 395 F.3d 516, 519 (4th Cir. 2005). Here, we decline to consider whether the grounds for dismissal relied on by the district court were proper because the record presents a more straightforward basis for affirmance, namely, that Appellants' claims are barred by the discretionary function exception.[3]

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[3] Although Appellants contend that the discretionary function exception does not apply to the conduct alleged here, they recognize that the applicability of this exception is "the core issue in this case." Br. of Appellants at 6.

The FTCA creates a limited waiver of the United States' sovereign immunity by authorizing damages actions for injuries caused by the tortious conduct of federal employees acting within the scope of their employment, when a private person would be liable for such conduct under state law. *See* 28 U.S.C.A. § 1346(b)(1). This waiver of sovereign immunity, however, is subject to several exceptions. "The most important of these . . . is the discretionary function exception," *McMellon v. United States*, 387 F.3d 329, 335 (4th Cir. 2004) (en banc), *cert. denied*, 125 S. Ct. 1828 (2005), which provides that the United States is not liable for "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused," 28 U.S.C.A. § 2680(a). The discretionary function exception "marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals." *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 808 (1984). Congress enacted this exception "to prevent judicial second-guessing of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort . . . [and] to protect the Government from liability that would seriously handicap efficient government operations." *Id.* at 814 (internal quotation marks omitted).

To determine whether conduct by a federal agency or employee fits within the discretionary function exception, we must first decide whether the challenged conduct "involves an element of judgment or choice." *Berkovitz v. United States*, 486 U.S. 531, 536 (1988); *see id.* (explaining that "the discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow" because "the employee has no rightful option but to adhere to the directive"). If the conduct does involve such discretionary judgment, then we must determine "whether that judgment is of the kind that the discretionary function exception was designed to shield," *i.e.*, whether the challenged action is "based on considerations of public policy." *Id.* at 536-37. This inquiry focuses "not on the agent's subjective intent in exercising the discretion . . . , but on the nature of the actions taken and on whether they are susceptible to policy analysis." *United States v. Gaubert*, 499 U.S. 315, 325 (1991). Thus, "a reviewing court in the usual case is to look to the nature of the challenged decision in an objective, or general sense, and ask whether that decision is one which we would expect inherently to be grounded in considerations of policy." *Baum v. United States*, 986 F.2d 716, 720-21 (4th Cir. 1993). Moreover, when a statute, regulation, or agency guideline permits a government agent to exercise discretion, "it must be presumed that the agent's acts are grounded in policy when exercising that discretion." *Gaubert*, 499 U.S. at 324.

Applying these principles here, we first conclude that Vega's participation in, and the FBI's approval of, criminal activity during the undercover investigation involved an element of judgment or choice. Agent Johnson's declaration notes that "[t]here is no statute, regulation, or policy directive that mandates that the FBI choose to employ[ ] any particular investigative technique in carrying out [fraud and money laundering] investigations"; rather, "the FBI is vested with broad discretionary power to determine whether a particular investigative technique, such [as] an undercover operation, is an appropriate means by which to conduct these types of investigations." J.A. 23. Indeed, Appellants concede that, in general, "undercover operations are necessarily discretionary in nature and hence immune from civil liability." Br. of Appellants at 6; *see id.* at 13 (recognizing that "the nature of undercover operations demands the exercise of discretion"). They contend, however, that the FBI exceeded its discretionary authority by participating in the crimes it was investigating. We disagree.

The Undercover Guidelines grant the FBI broad discretion in conducting undercover operations. They generally authorize the FBI to conduct undercover operations "that are appropriate to carry out its law enforcement responsibilities." J.A. 30. More specifically, the guidelines permit FBI officials to authorize, and agents to engage in, a wide range of activities in connection with undercover investigations—including "[a]ctivity that is proscribed by Federal, state, or local law as a felony or that is otherwise a serious crime," or that

presents "a significant risk of financial loss." *Id.* at 34-35. It is therefore clear that the conduct alleged by Appellants falls within the scope of the discretionary authority conferred on the FBI by the Undercover Guidelines.[4]

We further conclude that the challenged conduct was "based on considerations of public policy." *Berkovitz*, 486 U.S. at 537. The FBI's decision whether, as part of its investigation, to participate in criminal activity likely to result in financial loss to third parties "is one which we would expect inherently to be grounded in considerations of policy." *Baum*, 986 F.2d at 721. Indeed, the Undercover Guidelines expressly confirm this understanding, requiring FBI officials to "weigh the risks and benefits" of a proposed undercover operation, "giving careful consideration" to several policy-based factors, including "[t]he risk of . . . financial loss to persons or businesses" and "[t]he risk that individuals engaged in undercover operations may become involved in illegal conduct." J.A. 30. As Agent Johnson explains, FBI officials consider these factors in "mak[ing] discretionary judgments and authoriz[ing] the operations that

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[4] Agent Johnson's declaration confirms that the undercover operation at issue here received all necessary review and approval by FBI officials and that the conduct alleged by Appellants "fall[s] within the wide range of conduct, activities, and undercover scenarios which the FBI has discretion to utilize in furtherance of an undercover operation, pursuant to the authority of the Guidelines." *Id.* at 25.

advance an investigation while minimizing the risks."[5] *Id.* at 25.

We thus conclude that the conduct alleged by Appellants falls within the discretionary function exception, thereby barring their suit against the United States.[6] We note that our holding is consistent with the decisions of two other circuits that have applied the discretionary function exception in similar cases. *See Ga. Cas. & Sur. Co. v. United States*, 823 F.2d 260, 263 (8th Cir. 1987) (holding that a claim for financial losses arising from the FBI's undercover investigation of an automobile theft ring was barred because "[t]he FBI's decision to maintain secrecy . . . involved the balancing of policy considerations protected by the discretionary

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[5] The Undercover Guidelines impose various restrictions on agents' participation in otherwise illegal activity. For example, involvement in such activity may be authorized only for limited purposes, such as to obtain critical evidence not otherwise available or to establish credibility of a cover identity. Agents also may not participate in acts of violence except in self-defense. Further, FBI officials contemplating proposed undercover operations involving "sensitive circumstances"—such as participation in otherwise criminal activity—must "determine whether adequate measures have been taken to minimize the incidence of sensitive circumstances and reduce the risks of harm and intrusion that are created by such circumstances." *Id.* at 35-36.

[6] We also conclude that Appellants' claim that the FBI negligently hired and supervised Vega is barred by the discretionary function exception. Courts have repeatedly held that government employers' hiring and supervisory decisions are discretionary functions. *See, e.g., Nurse v. United States*, 226 F.3d 996, 1001-02 (9th Cir. 2000); *Burkhart v. Washington Metro. Area Transit Auth.*, 112 F.3d 1207, 1217 (D.C. Cir. 1997).

function exception"); *see also Frigard v. United States*, 862 F.2d 201, 203 (9th Cir. 1988) (per curiam) (holding that a suit alleging financial fraud by an investment company used by the CIA as a cover for its operations was barred by the discretionary function exception because "the alleged decisions by the CIA to use [the company] and to keep its use of the company secret are administrative decisions grounded in social and economic policy"). We agree with the core principle articulated by the Eighth and Ninth Circuits—that discretionary, policy-based decisions concerning undercover operations are protected from civil liability by the discretionary function exception, even when those decisions result in harm to innocent third parties. Imposing liability for such decisions "would seriously handicap" the FBI and other federal law enforcement agencies in carrying out the important duties assigned to them by Congress. *Varig Airlines*, 467 U.S. at 814 (internal quotation marks omitted). "Were we to permit this suit to succeed, we would stymie the very purpose of the discretionary function exception by permitting the second-guessing of policy through a tort action." *Williams v. United States*, 50 F.3d 299, 310 (4th Cir. 1995). While we are not unsympathetic to the financial losses suffered by Appellants, we must apply the discretionary function exception as we believe Congress intended it. *See Ga. Cas. & Sur.*, 823 F.2d at 263 ("While we acknowledge the harm to innocent [third parties] in this case, we cannot ignore congressional intent to protect the Government from suit through the discretionary function exception.").

III.

For the reasons set forth above, we affirm the district court order dismissing Appellants' action for lack of subject matter jurisdiction.

AFFIRMED

JUDGMENT

FILED: March 28, 2006

[ENTERED: MARCH 28, 2006]

UNITED STATES COURT OF APPEALS

for the

Fourth Circuit

No. 05-1521
CA-04-358-3

FRED SUTER; TERRY D. SUTER; GREEN MEADOWS, LLC; PAULA TOTHEROW; DONNA L. HELMS; STEPHEN MILLER; HILDA A. TOTHEROW; GINNY BLANKENSHIP; ARTHUR HELMS, III; WILLIAM E. FOWLER; CAROLYN FOWLER; SIDNEY A. LIVINGSTON; EUGENE ROYALS; DENNIS GRUBAUGH; DEBORAH GRUBAUGH; JAMES KOENIG; MICHELLE KOENIG; DAN E. HOLMAN; FRANKIE EDMUNDSON; FRANK GOODMAN; ANGELO ANTONUCCI; MARSHALL S. REDDING, Dr.; G. DOUGLAS HAYDEN, JR.; CLAUDE G. CRISP; STEPHEN M. SCHWARTZ; DALE C. PETERS; ALMA B. SCHWARTZ

Plaintiffs - Appellants

v.

UNITED STATES OF AMERICA

Defendant - Appellee

Appeal from the United States District Court for the Western District of North Carolina at Charlotte

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In accordance with the written opinion of this Court filed this day, the Court affirms the judgment of the District Court.

A certified copy of this judgment will be provided to the District Court upon issuance of the mandate. The judgment will take effect upon issuance of the mandate.

/s/ Patricia S. Connor

CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
NORTH CAROLINA
CHARLOTTE DIVISION
3:04cv358

FRED SUTER ET AL.,

Plaintiffs,

V. **ORDER**

UNITED STATES OF AMERICA,

Defendant.

THIS MATTER is before the Court upon Defendant's "Motion to Dismiss for Lack of Subject Matter Jurisdiction" (Document #2). Plaintiff filed a response, and Defendant replied. Accordingly, the matter is ripe for consideration, and the Court is prepared to rule on the motion.

I. Standard of Review

"A motion to dismiss under [Fed. R. Civ. P. 12(b)(6)] tests the sufficiency of a complaint; importantly, it does not resolve contests surrounding the facts, the merits of a claim, or the applicability of "defenses." *Republican Party of North Carolina v. Martin,* 980 F.2d 943, 952, (4th Cir. 1993) (*citing* 5A C. WRIGHT & A. MILLER, FED. PRACTICE AND PROCEDURE § 1356 (1990)). "A motion to dismiss for failure to state a claim should not be granted unless it appears to a certainty that the plaintiff would be

entitled to no relief under any state of facts which could be proved in support of [the subject] claim." *McNair v. Lend Lease Trucks, Inc.*, [illegible] F.3d 325, 328 (4th Cir. 1996) *(en banc)* (citations omitted). In considering a Rule 12(b)(6) motion, the complaint must be construed in the light most favorable to the nonmoving party, assuming factual allegations to be true. *See, e.g., Hishon v. King & Spalding,* 467 U.S. 69, 73 (1984); *Revene* v. *Charles County Comm'rs,* 882 F.2d 870, 872 (4th Cir. 1989). "A complaint should not be dismissed for failure to state a claim... unless after accepting all well-pleaded allegations in the plaintiffs complaint as true and drawing all reasonable factual inferences from those facts in the plaintiffs favor, it appears certain that the plaintiff cannot prove any set of facts in support of his claim entitling him to relief." *Veney* v. *Wyche,* 293 F.3d 726, 730 (4th Cir. 2002).

II. Facts

Plaintiffs in this case are victims of a large-scale Ponzi and money laundering scheme that developed between 1998 and 2001. Many of the conspirators in the scheme were successfully prosecuted, and Plaintiffs now assert claims in this case against the United States of America ("the Government") and Federal Bureau of Investigation ("TBI") Agent John Vega.[1] Plaintiffs maintain that while undercover, Agent Vega "assisted the

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[1] Plaintiffs' Complaint asserts claims against both the FBI and Agent Vega, individually. The case caption, however, only lists the United States of America as a defendant. Therefore, this order refers, only to the "Defendant," using the term in its singular form.

criminals by helping them to conceal and perpetrate their frauds, which actions drastically extended the scope of the injury inflicted and the number of victims injured." The conspirators' organization, Esposito Organization, created Southtech Holdings, Inc. and Carribean Merchant's Bank to conduct various fraudulant activity. Plaintiffs assert that Agent Vega helped form both entities and served as chief operating officer of Southtech Holdings. Moreover, Plaintiffs claim that Vega helped maintain Esposito's corporate office in Florida and aided the organization in its money laundering efforts. Plaintiffs assert that Agent Vega personally profited from his undercover activity and became "a part of the very criminal conspiracy which he was appointed to investigate." In addition, Plaintiffs contend that the FBI knew of the Agent Vega's role in the conspiracy and the extent of his participation. Plaintiffs filed a Complaint asserting claims of fraud, aiding and abetting fraud, and negligence under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671-2680.

III. Discussion

The Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), authorizes lawsuits against the United States for damages "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." The

Act, however, also provides several exceptions from this waiver of sovereign immunity, 28 U.S.C. §§ 1346(b), §§ 2680 (a)- 2680(h).

Defendant filed a motion to dismiss for lack of subject matter jurisdiction that asserts the following: 1) all of Plaintiffs' claims are barred by the misrepresentation exception and the discretionary function exceptions of the FTCA, 28 U.S.C. §§ 1346(b), 2680(a), 2680(h) and 2) Plaintiffs' claim that the FBI's undercover operation was negligently conducted and supervised is not cognizable under the FTCA because a private person under North Carolina law would not be liable for analogous conduct. After reviewing the parties' arguments and applicable authority, this court finds that Plaintiffs' fraud claims and negligence claim should be dismissed for lack of subject matter jurisdiction. Plaintiffs' fraud claims are barred by § 2680(h) of the FTCA, and Plaintiffs' negligence claim is not cognizable under the Act because under North Carolina law, a private person would not be liable for analogous conduct.

A. Fraud and Aiding and Abetting Fraud (Count I)

Plaintiffs' Complaint asserts that Agent Vega made false statements and promises to them to further the Esposito Ponzi scheme and that Plaintiffs relied on these statements to their detriment. As a result, Plaintiffs claim that Agent Vega and the Government as his employer are liable to them under the FTCA for fraud and aiding and abetting fraud.

Section 2680(h) of the FTCA provides that the Act will not apply to, "any claim arising out of... misrepresentation [or] deceit...." Here, Defendant asserts that Plaintiffs' fraud claims are barred by the misrepresentation exception, and this court agrees, 28 U.S.C. §§ 1346(b), 2680(h). In *United States* v. *Neustadt,* the United States Supreme Court held that all claims arising out of reliance on negligent or intentional misrepresentation by a government employee are barred by section 2680(h) of the FTCA. 366 U.S. 696, 705-07 (1961). Fraud, by definition, is an intentional or knowing misrepresentation. *See Black's Law Dictionary* 670-71 (7th ed. 1999*); Lane v.* U.S., 286 F.3d 723, 731 (4th Cir. 2002). Therefore, this court holds that Plaintiffs' fraud claims against the Government and Agent Vega fall squarely under the FTCA's misrepresentation exception and will be dismissed for lack of subject matter jurisdiction.

B. Negligence (Count II)

Plaintiffs also assert a negligence claim against Defendant stating that Agent Vega "in the course of his duties as a criminal investigatory agent . . . failed to exercise dure care to avoid unnecessary harm to them as investors in the Esposito Organization." Further, Plaintiffs state that the FBI is liable to the Plaintiffs primarily for failing to exercise due care in hiring and supervising Vega and secondarily as Vega's employer, under the common law doctrine of respondeat superior. Defendant asserts that the FTCA's misrepresentation exception, 28 U.S.C. §§ 1346(b), 2680(h), and its discretionary conduct exception, 28 U.S.C. §§

1346(b), 2680(a), bar Plaintiffs' negligence claim. However, this court finds Defendant's cognizable claim argument the most compelling. Defendant asserts that Plaintiffs' negligence claim must be dismissed because Plaintiffs failed to allege a cognizable claim under the FTCA. The Act provides that the Government may be sued "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. §§ 1346(b). Defendant argues that under North Carolina law, a private person could not be liable for negligently conducting or supervising an undercover criminal investigation. This court agrees and dismisses Plaintiffs' negligence claim for lack of subject matter jurisdiction.

IT IS, THEREFORE, ORDERED that Plaintiffs "Motion to Dismiss for Lack of Subject Matter Jurisdiction" (Document #2) is **GRANTED**. Accordingly, Plaintiffs action alleging fraud, aiding and abetting fraud, and negligence shall be **DISMISSED WITH PREJUDICE**.

This 1st day of March 2005.

/s/ Graham C. Mullen
GRAHAM C. MULLEN
CHIEF UNITED STATES
DISTRICT JUDGE

CC:
Judge ( )
Magistrate Judge ( )
U.S. Marshal ( )

Probation	( )
U.S. Attorney	( )
Atty. for Deft.	( )
Defendant	( )
Warden	( )
Bureau of Prisons	( )
Court Reporter	( )
Courtroom Deputy	( )
Orig-Security	( )
Bankruptcy Clerk's Ofc.	( )
Other	( )

Date: 3/2/05

Frank G. Johns, Clerk
By: /s/ _____
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
NORTH CAROLINA
CHARLOTTE DIVISION

FRED SUTER ET AL.,

Plaintiffs.

v. **Civil Action No. 3:04CV358-MU**

UNITED STATES OF AMERICA,

Defendant.

MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

Pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, the United States moves to dismiss with prejudice plaintiffs' cause of action in its entirety because the Court lacks jurisdiction over the subject matter of plaintiffs' claims. This motion is supported by the accompanying Memorandum of Law, the Declaration of John A. Johnson, and the entire record herein.

Respectfully submitted this 25th day of October, 2004,

PETER KEISLER
Assistant Attorney General, Civil Division

GRETCHEN C. F. SHAPPERT
United States Attorney

PAUL F. FIGLEY
Deputy Director, Torts Branch, Civil Division

/s/ Madeline Henley
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Attorneys for Defendant
United States of America

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of October, 2004, true and correct copies of the foregoing **United States' Motion To Dismiss For Lack Of Subject Matter Jurisdiction,** and **United States' Memorandum in Support** thereof were deposited for same-day mailing, postage prepaid, in the Department of Justice mail room for delivery to counsel for the plaintiff:

John F. Hanzel, Esq.
Hanzel & Newkirk
19425-G Liverpool Parkway
Cornelius, North Carolina 28031

/s/ Madeline Henley
Madeline Henley, Esq.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
NORTH CAROLINA
CHARLOTTE DIVISION

FRED SUTER, et al.

Plaintiffs.

v. **Civil Action No. 3:04CV358-MU**

UNITED STATES OF AMERICA,

Defendant.

DECLARATION OF JOHN A. JOHNSON

I, John A. Johnson, do hereby declare as follows.

~~1.~~1. I am a Supervisory Special Agent of the Federal Bureau of Investigation (FBI), and I am presently assigned as the Unit Chief of the Undercover and Sensitive Operations Unit (USOU) at FBI Headquarters in Washington, D.C. I have been assigned to this position since approximately March 2004. I have been employed by the FBI since May 1988, and during my sixteen (16) year tenure with the FBI, I have served as both a Case Agent and a Supervisor in undercover and sensitive operations.

2. In my capacity as Unit Chief of the USOU, I am responsible for overall coordination, supervision, and review of the functions of the USOU, which include: the close review and analysis of

undercover proposals for operational issues, sensitive circumstances, and budget matters prior to their presentation to the Criminal Undercover Operations Review Committee (CUORC) at FBI Headquarters; the formulation and implementation of policy, instruction, and other direction as necessary for the purpose of guiding Bureau personnel regarding aspects of the undercover program; the preparation and support of FBI employees assigned in an undercover capacity for the performance of their task in a manner to ensure that they operate in safe and well conceived scenarios that offer the best opportunity to gather evidence of illegal activity; and the training and certification of undercover employees, management of the undercover budget, and other related administrative and operational matters.

~~3.~~3. The matters stated in this Declaration are based upon my knowledge, upon my review and consideration of documents that are available to me, and upon information that has been furnished to me by other employees of the FBI. I have reviewed the Complaint in the above- captioned lawsuit and am aware of the allegations therein concerning the alleged conduct of ah FBI Agent named "John Vega" during the course of an FBI investigation.

~~4.~~4. The FBI investigation at issue in this lawsuit concerned a criminal financial enterprise involving wide-scale fraud and money laundering. One of the subjects of this investigation was an individual named Albert Esposito. The investigation initiated in the FBI's Miami Division, and use of an Undercover Operation was initially approved in

furtherance of the investigation by the CUORC at FBI Headquarters on or about December 8, 1999. An FBI Special Agent in the Miami Division was assigned in an undercover capacity to this investigation under the fictitious name "John Vega." The investigation resulted in the successful prosecution of Esposito on money laundering charges in the Southern District of Florida. *See United States* v. *Esposito,* No. 01-CR-l 144 (S.D. Fla.). Esposito and three (3) of his associates were also successfully prosecuted on various fraud charges in the Western District of North Carolina as a result of a parallel investigation conducted by the FBI's Charlotte Division. *See United States* v. *Esposito,* No. 01-CR-202 (W.D.N.C.).

~~5.~~5. The FBI, a component of the Department of Justice, is empowered to investigate violations of all federal statutes not specifically assigned by Congress to any other government agency. 18 U.S.C. § 3052; 28 U.S.C. § 533; 28 C.F.R. § 0.85. Thus, the FBI is vested with primary jurisdiction to investigate, *inter alia,* money laundering, 18 U.S.C. §§ 1956, 1957, wire fraud, 18 U.S.C. § 1343, and mail fraud, 18 U.S.C. § 1341, all of which were jurisdictional bases for the investigation at issue in this case. There is no statute, regulation, or policy directive that mandates that the FBI choose to employee any particular investigative technique in carrying out such investigations. Thus, in carrying out its statutorily authorized duties, the FBI is vested with broad discretionary power to determine whether a particular investigative technique, such an undercover operation, is an appropriate means by which to conduct these types of investigations.

~~6.~~6. Attached for the Court's reference as Exhibit A to this Declaration is a copy of the Attorney General's Guidelines on FBI Undercover and Sensitive Operations (Revised 11/3/92), which was in effect at the time of the investigation at issue in this lawsuit [hereinafter "the Guidelines"]. Because of my duties and responsibilities as Unit Chief of the USOU and because of my extensive experience in the area of undercover and sensitive operations, I am very familiar with these Guidelines and its application to FBI investigative matters. In addition, because of my experience in review and coordination of undercover operations throughout the FBI, I am very familiar with the types of undercover activities and scenarios which are utilized by the FBI pursuant to the authority granted by the Attorney General in these Guidelines. The Guidelines were amended in 2002; however, the provisions of the 1992 Guidelines which are discussed in this declaration also appear in the 2002 version.

7. The Attorney General has vested the FBI with discretion to conduct undercover operations in furtherance of FBI investigations. *See generally* Exhibit A. The Guidelines recognize that: "[t]he use of the undercover technique, including proprietary business entities, is essential to the detection, prevention, and prosecution of white collar crimes, public corruption, terrorism, organized crime, offenses involving controlled substances, and other priority areas of investigation." Ex. A. at 3.

8. The Guidelines also vest discretion in FBI officials responsible for the review and oversight of undercover operations to authorize a wide variety

of activities, techniques, and scenarios as may be necessary in furtherance of an FBI investigation, including but not limited to: the purchase, rental, or lease of property, Exhibit A at 6; "the deposit of appropriated funds into banks or other financial institutions," *id.* at 6; the "use of proceeds generated by the undercover operation to offset necessary and reasonable expenses of the operation," *id.* at 6; the involvement of "[a]ctivity that is proscribed by Federal, state, or local law as a felony or that is otherwise a serious crime ...," *id.* at 8; and "establishing, acquiring, or using a proprietary," *id.* at 8. As defined in the Guidelines, a "'Proprietary' means a sole proprietorship, partnership, corporation, or other business entity operated on a commercial basis, which is owned, controlled, or operated wholly or in part on behalf of the FBI, and whose relationship with the FBI is concealed from third parties." *Id.* at 3. The Guidelines state that the FBI "may operate a proprietary to the extent necessary to maintain an operation's cover or effectiveness." *Id.* at 4.

9. When determining the manner in which a particular undercover or sensitive operation or activity is to be carried out, FBI supervisory personnel "weigh the risks and benefits of the operation" on a case-by-case basis, giving careful consideration to the following factors: "(1) [t]he risk of personal injury to individuals, property damage, financial loss to persons or businesses, damage to reputation, or other harm to persons; (2) [t]he risk of civil liability or other loss to the Government; (3) [t]he risk of invasion of privacy or interference with privileged or confidential relationships; (4) [t]he risk that individuals engaged in undercover operations may become involved in

illegal conduct restricted [under tie Guidelines]...; and (5) [t]he suitability of Government participation in the type of activity that is expected to occur during the operation." Exhibit A at 4. In considering the aforementioned factors, officials make discretionary judgments and authorize the operations that advance an investigation while minimizing the risks.

~~10.~~10. The undercover operation at issue in this lawsuit received all required review and, consideration, by CUORC and subsequent approval by the Assistant Director, Criminal Investigative Division, at FBI Headquarters, pursuant to the procedures set forth in the Guidelines.

~~11.~~11. The conduct and activities of "John Vega." as alleged by the Plaintiffs in paragraphs 39-44, 46-47, 50-55, 57-58, and 61-62 of the Complaint in the above-captioned civil action, fall within the wide range of conduct, activities, and undercover scenarios which the FBI has discretion to utilize in furtherance of an undercover operation, pursuant to the authority of the Guidelines. I declare under penalty of perjury that the foregoing is true and correct.

Executed this 25th day of October, 2004.

/s/ John A. Johnson
JOHN A. JOHNSON, Unit Chief
Undercover and Sensitive Operations Unit
Federal Bureau of Investigation
Washington, D.C.

U.S. Department of Justice
Federal Bureau of Investigation

Undercover and Sensitive Operations Unit

Attorney General's Guidelines on FBI Undercover Operations Revised 11/13/92

Investigative Support Section
Criminal Investigative Division

EXHIBIT A

ATTORNEY GENERAL'S GUIDELINES ON FEDERAL BUREAU OF INVESTIGATION UNDERCOVER OPERATIONS

The following Guidelines on the use of undercover activities and operations by the Federal Bureau of Investigation (FBI) are issued under the authority of the. Attorney General provided in Title 28, United States Code, Sections 509, 510, and 533. They apply to all investigations conducted by the FBI, except those conducted pursuant to its foreign counterintelligence and foreign intelligence responsibilities.

I. INTRODUCTION

II. DEFINITIONS

III. GENERAL AUTHORITY

IV. AUTHORIZATION OF UNDERCOVER OPERATIONS

A. General Approval Standards

B. Undercover Operations Which May be Authorized by the Special Agent in Charge (SAC)

C. Operations Which Must be Approved at FBIHQ

D. Criminal Undercover Operations Review Committee

E. Approval by the Director, Deputy Director, or Designated Assistant Director

F. Application/Notification to FBIHQ

G. Duration of Authorization

H. Participation in Otherwise Illegal Activity by Undercover Employees

I. Emergency Authorization

V. PROTECTING INNOCENT PARTIES AGAINST ENTRAPMENT

A. Entrapment

B. Authorization Requirements

C. Exception

VI. MONITORING AND CONTROL OF UNDERCOVER OPERATIONS

A. Preparation of Undercover Employees, Informants, and Cooperating Witnesses

B. Review of Conduct

C. Continuing Consultation with the Appropriate Federal Prosecutor

D. Serious Legal, Ethical, Prosecutive, or Departmental Policy Questions, and Preciously Unforeseen Sensitive Circumstances

E. Annual Report of the Undercover Review Committee

F. Deposit of Proceeds; Liquidation of Proprietaries

VII. RESERVATION

I. INTRODUCTION

The use of the undercover technique, including proprietary business entities, is essential to the detection, prevention, and prosecution of white collar crimes, public corruption, terrorism, organized crime, offenses involving controlled substances, and other priority areas of investigation.

However, these techniques inherently involve an element of deception and may require cooperation with persons whose motivation and conduct are open to question, and so should be carefully considered and monitored.

II. DEFINITIONS

A. "Undercover Activities" means any investigative activity involving, the use of an assumed name or cover identity by an employee of the FBI or another Federal, state, or local law enforcement organization working with the FBI.

B. "Undercover Operation" means an investigation involving a series of related undercover- activities, over a period of time by an undercover employee. For purposes of these Guidelines, a "series of related undercover activities" generally consists of more than three separate contacts by an undercover employee with the individual(s) under investigation. However, undercover activity involving sensitive or fiscal circumstances constitutes an undercover operation regardless of the number of contacts ' involved.

C. "Undercover Employee" means any employee of the FBI, or employee of a-Federal, state, or local law enforcement agency working under the direction and control of the FBI in a particular investigation, whose relationship with the FBI is concealed from third parties in the course of an investigative operation by the maintenance of a cover or alias identity.

D. "Proprietary" means a sole proprietorship, partnership, corporation, or other business entity operated on a commercial basis, which is owned, controlled, or operated wholly or in part on behalf of the FBI, and whose relationship with the FBI is concealed from third parties.

E. "Appropriate Federal Prosecutor" means a United States Attorney or Section Chief in the Criminal Division of the Department of Justice (DOJ).

III. GENERAL AUTHORITY

The FBI may use undercover activities and conduct undercover operations, pursuant to these Guidelines, that are appropriate to carry out its law enforcement responsibilities. These guidelines do not apply to investigations utilizing confidential informants, cooperating witnesses or cooperating subjects, unless the investigation also utilizes an undercover employee. The FBI, through the development of internal policy, may choose to apply these Guidelines to certain confidential informant, cooperating witness, and cooperating subject operations by referring such matters to the Undercover Review Committee pursuant to Section IV, Paragraph (D)(6).

Under this authority, the FBI may participate in joint undercover activities with other law enforcement agencies and may operate a proprietary to the extent necessary to maintain an operation's coyer or effectiveness. All joint undercover

operations are to be conducted pursuant to these Guidelines.

IV. AUTHORIZATION OF UNDERCOVER OPERATIONS

A. General approval Standards: Any official considering approval or authorization of a proposed undercover application shall weigh the risks and benefits of the operation, giving careful consideration to the following factors:

(1) The risk of personal injury to individuals, property damage, financial loss to persons or businesses, damage to reputation, or other harm to persons;

(2) The risk of civil liability or other loss to the Government;

(3) The risk of invasion of privacy or interference with privileged or confidential relationships;

(4) The risk that individuals engaged in undercover operations may become involved in illegal conduct, restricted in paragraph IV.H. below; and

(5) The suitability of Government participation in the type of activity that is expected to occur during-the operation.

B. Undercover Operations Which May be Authorized by the Special Agent in Charge (SAC)

(1) The establishment, extension, or renewal of all undercover operations to be supervised by a given field office must be approved by the SAC. If the undercover operation does not involve any of the factors listed in paragraph IV.C. below, this approval shall constitute authorization for the operation.. Approval requires a written determination, stating supporting facts and circumstances, that:

(a) Initiation of investigative activity regarding the alleged criminal conduct or criminal enterprise is warranted under any applicable departmental guidelines;

(b) The proposed undercover operation appears to be an effective means of obtaining evidence or necessary information. This finding should include a statement of what prior investigation has been conducted and what chance the operation has of obtaining evidence or necessary information concerning the alleged criminal conduct or criminal enterprise;

(c) The undercover operation will be conducted with minimal intrusion consistent with, the need to collect the evidence or' information in a timely and effective manner;

(d) Approval for the use .of any informant or confidential source has been obtained as required by the Attorney General's Guidelines on Use of Informants and Confidential Sources;

(e) Any foreseeable participation by an undercover employee in illegal activity that can be approved by the SAC on his or her own authority is justified by the- factors noted in paragraph H;

(f) If there is no present expectation of the occurrence of any of the sensitive or fiscal circumstances listed in paragraph C, a statement to that effect.

(2) Undercover operations may be authorized pursuant to this subsection for up to- six months and continued upon renewal for an additional six-month period, for a total of no more

than one year. Undercover operations initiated pursuant to this subsection may not involve the expenditure of more than $40,000 ($100,000 in drug cases of which a maximum of $40,000 is for operational expenses), or' such other amount that is set from time to time by the Director, without approval from FBI Headquarters (FBIHQ).

(3) The SAC may delegate the responsibility to authorize the establishment, extension, or renewal of undercover operations to designated Assistant Special Agents in Charge. The delegation of this responsibility by the SAC should be in writing and maintained in the appropriate field office. However, all undercover operations which must be authorized at FBIHQ must be approved by the SAC.

(4) A copy of all written approvals described in (1) above shall be forwarded promptly to FBIHQ.

C. Operations Which Must be Approved at FBIHQ

(1) Fiscal Circumstances

In all undercover operations involving the fiscal circumstances set out below, the SAC shall submit an application to FBIHQ in accordance with paragraph

IV. F. below. A recommendation for authorization may be forwarded directly to the Director or designated Assistant Director or, in operations involving only fiscal circumstances letters (a)-(c), to the designated Deputy Assistant Director for final review and authorization, provided that the approval levels conform to all applicable laws.

Applications for approval of undercover operations referred to FBIHQ only because of fiscal circumstances need not be considered or approved by the Undercover Review Committee.

For purpose of these Guidelines, an undercover operation involves fiscal circumstances, if there is a reasonable expectation that the undercover operation will - -

(a) Require the purchase or lease of property, equipment, buildings, or facilities; the alteration of buildings or facilities; a contract for construction or alteration of buildings or facilities; or prepayment of more than one-month's rent;

NOTE: The purchase, rental, or lease of property using an assumed name or cover identity to facilitate a physical or technical surveillance is not an undercover operation for purposes of these Guidelines. However, since the expenditure of appropriated funds is involved, approval must be obtained from FBIHQ in conformance with applicable laws.

(b) Require the deposit of appropriated funds or proceeds generated by the undercover operation into banks or other financial institutions;

(c) Use the proceeds generated by the undercover operation to offset necessary and reasonable expenses of the operation;

(d) Require a reimbursement or compensation agreement with cooperating individuals or entities for services or losses incurred by them in aid of the operation (any reimbursement agreement entered into with third parties must be reviewed by the FBI's legal Counsel Division); or

(e) Exceed the limitations on duration or commitment of resources established by the Director for operations initiated at the field office level.

(2) Sensitive Circumstances

In all undercover operations involving any sensitive circumstances listed below, the SAC shall submit an application to FBIHQ in accordance with paragraph F below. The application shall be reviewed by appropriate supervisory personnel at FBIHQ and, if favorably recommended, sent to the Undercover Review committee for consideration. The application shall then be forwarded to the Director or a designated Assistant Director, who may approve or disapprove the application.

For purposes of these Guidelines, sensitive circumstances are involved if there is a reasonable expectation that the undercover operation will involve - -

(a) an investigation of possible criminal conduct by any elected or appointed official, or political candidate, for a judicial-, legislative-, management-, or executive-level position of trust in a Federal, state, or local

governmental entity or political subdivision thereof;

(b) an investigation of any public official at the Federal, state, or local level in any matter involving systemic corruption of any governmental function;

(c) an investigation of possible criminal conduct by any foreign official or government, religious organization, political organization, or the news media;

NOTE: There are some circumstances involving officials in judicial, legislative, management, or executive-level positions which may logically be considered nonsensitive. In such instances, the Section Chief, White-Collar Crimes Section, FBIHQ, who is a member of the Criminal Undercover Operations Review Committee and has a national perspective on matters involving public officials, must be consulted for a determination as to whether the undercover operation should be presented to the Undercover Review Committee.

(d) Engaging in activity having a significant effect on or constituting a significant intrusion into the legitimate

operation of a Federal, state, or local governmental entity;

(e) Establishing, acquiring, or using a proprietary;

(f) Providing goods or services which are essential to the commission of a crime, which goods and services are reasonably unavailable to a subject of the investigation except from the Government;

(g) Activity that is proscribed by Federal, state, or local law as a felony or that is otherwise a serious crime -- but not including the purchase of stolen or contraband goods; the delivery or sale by the Government of stolen property whose ownership cannot be determined; the controlled delivery of drugs which will not enter commerce; the payments of bribes which are not included in the other sensitive circumstances; or the making of false representations to third parties in concealment of personal' identity or the true ownership of a proprietary (this exemption does not include any statement under oath or the

penalties of perjury). (See Paragraph H below);

NOTE: Some of the above activities, including the controlled delivery of drugs and bribe payments, are subject to specific review and approval procedures. These matters must be coordinated with FBIHQ.

(h) A significant risk that a person participating in an undercover operation will be arrested or will supply falsely sworn testimony or false documentation in any legal or administrative proceeding (See paragraph H below);

(i) Attendance at a meeting or participation in communications between any individual and his or her lawyer;

(j) A significant risk that a third party will enter into a professional or confidential relationship with a person participating in an undercover operation who is acting as an attorney, physician, clergyman, or member of the news media;

(k) A request to an attorney, physician, member of the clergy,

or other person for information that would ordinarily be privileged or to a member of the hews media concerning an individual with whom the news person is known to have a professional or confidential relationship;

(l) Participation in the activities of a group under investigation as part of a Domestic Security Investigation or recruiting a person from within such a group as an Informant;

(m) A significant risk of violence or physical injury to individuals or a significant risk of financial loss;

(n) Activities which could result in significant claims against the United States arising in tort, contract, or for compensation, for the "taking" of property;

(o) Untrue representations by a person participating in the undercover operation concerning the activities or involvement of any third person without that

individual's knowledge or consent.

D. <u>Criminal Undercover Operations Review Committee (Undercover Review Committee)</u>

(1) The Undercover Review Committee shall consist of appropriate employees of the FBI designated by the Director and Criminal Division attorneys designated by the Assistant Attorney General in charge of the Criminal Division, DOJ, to be chaired by a designee of the Director.

(2) When an application from an SAC for approval of an undercover operation involving sensitive circumstances specified in paragraph C(2) is received by FBIHQ, upon recommendation by the FBIHQ substantive section, the Committee members will meat to review the application. Criminal Division members of the Committee may consult with appropriate FBI personnel, senior DOJ officials, and the United States Attorney as deemed appropriate. The committee shall submit the application to the Director or designated Assistant Director with a recommendation for approval or disapproval of the request and any recommended changes or amendments to the proposal.

(3) In addition to the considerations contained in IV.A. above, the Committee, shall also examine the application to determine whether adequate measures have been taken to minimize the incidence of sensitive circumstances and reduce, the risks of harm and intrusion that are created by such circumstances. If the Committee recommends approval of an undercover operation, the recommendation shall include a brief written statement explaining why the operation merits approval in light of the anticipated occurrence of sensitive circumstances.

(4) The Committee shall recommend approval of an undercover operation, only upon reaching a consensus, provided that:

(a) If one or more of the designees of the Assistant Attorney General in charge of the Criminal Division does not join in a recommendation for approval of a proposed operation, because of legal, ethical, prosecutive, or departmental policy considerations, the designee shall promptly advise the Assistant Attorney General and no further action shall be taken on the proposal until the designated Assistant Director has had an

opportunity to consult with the Assistant Attorney General; and

(b) If, upon consultation, the Assistant Attorney General disagrees with, a decision by the designated Assistant Director to approve the proposed operation, no further action shall be taken on the proposal without the approval of the Deputy Attorney General or the Attorney General.

(5) The committee should consult the Legal Counsel Division of the FBI and the Office of Legal Counsel or other appropriate division or office at DOJ about any significant unsettled legal questions concerning authority for, or the conduct of, a proposed undercover operation.

(6) The Director, Assistant Attorney General, or other official designated by them may refer any sensitive investigative matter, including informant, cooperating witness, and cooperating subject operations, to the Undercover Review Committee for advice, recommendation or comment, regardless of whether an undercover operation is involved.

(7) The United States Attorney, Special Agent in Charge or any member

of their staffs, may attend the Criminal Undercover Operations Review Committee in order to advocate for the approval of an undercover operation.

(8) If the Special Agent in Charge and the United States Attorney jointly disagree with any stipulation set by the Criminal Undercover Operations Review Committee regarding the approval of an undercover operation, they may consult with the chairman of the Criminal Undercover Operations Review Committee who may schedule a meeting of the committee to reconsider the issue in question.

(9) At any time during the undercover operation the Special Agent in Charge can appeal any Headquarters decision directly to the Assistant Director. Likewise, the United States Attorney can appeal directly to the Assistant Attorney General, Criminal Division, or the Deputy Attorney General as appropriate.

E. <u>Approval by the Director, Deputy Director, Associate Deputy Director - Investigations, or Designated Assistant</u>

A designated Assistant Director may approve an undercover operation considered by the Undercover Review Committee, unless the

investigation involves sensitive circumstances (l) or (m). Except pursuant to the limited circumstances described in Section I below, only the Director, Deputy Director, or Associate Deputy Director-Investigations may approve a proposed operation if a reasonable expectation exists that:

(1) The undercover operation will be used to participate in the activities of a group under investigation as part of a Domestic Security Investigation or to recruit a person from within such a group as an informant or confidential source (Sensitive circumstance (1));

(2) There may be a significant risk of violence or personal injury to individuals or a significant risk of financial loss (Sensitive Circumstance (m)).

F. Application/Notification to FBIHQ

(1) Application to FBIHQ must be made for any undercover operation requiring FBIHQ approval. Each application shall include:

(a) The written SAC approval described in B(l) above;

(b) A description of the proposed operation and the particular cover to be employed; any informants or other

cooperating persons who will assist in the operation, including background information, arrest record, and plea agreements; the particular offense or criminal enterprise under investigation; and any individuals known to be involved;

(c) A statement of the period of time for which the operation would be maintained;

(d) A description of how the requirements concerning any inducements to be offered as discussed in Section V.B. below have been met; and

(e) A statement of proposed expenses.

(2) Applications for approval of undercover operations involving sensitive circumstances listed in paragraph C(2) shall also include the following information:

(a) A statement of which circumstances are reasonably expected to occur, what the facts are likely to be, and why the undercover operation merits approval in light of the circumstances, including:

(i) For undercover operations involving sensitive circumstance (g), a statement why the participation in otherwise illegal activity is justified under the requirements of paragraph H below, and a letter from the appropriate Federal prosecutor pursuant to paragraph F(2)(b);

(ii) For undercover operations involving sensitive circumstance (1), a statement why the infiltration or recruitment is necessary and a description of procedures to minimize any acquisition, retention, and dissemination of information that does not relate to the matter under investigation or to other authorized investigative activity.

(b) A letter from the appropriate Federal prosecutor indicating that he or she has reviewed the proposed, operation, including the sensitive

circumstances reasonably expected to occur, agrees with the proposal and its legality, and will prosecute any meritorious case that has developed. The letter should include a finding that the proposed investigation would be an appropriate use of the undercover technique and that the" potential prosecutive benefits outweigh any direct costs or risks of other harm.

(3) An application for the extension or renewal of an undercover operation should describe the results obtained from the operation or explain any failure to obtain significant results and, where sensitive circumstances are involved, should include a letter from the appropriate Federal prosecutor favoring the extension or renewal of authority.

G. Duration of Authorization

(1) An undercover operation approved by FBIHQ may not continue longer than is necessary to achieve the objectives specified in the authorization, nor in any event longer than six months, without new authorization to proceed, except pursuant to subparagraph (3) below.

(2) If there is significant change in either the direction or objectives of an undercover operation approved by FBIHQ, the operation must be reviewed by the Undercover Review Committee to determine whether a new authorization is necessary.

(3) An undercover operation which requires review by the Undercover Review Committee may be initiated or extended on an interim basis by the designated Assistant Director in the event of exigent circumstances, for a period not to exceed 30 days. In the case of an initial authorization, budget enhancement, or change in focus, the interim authority must be ratified by the Undercover Review Committee at its next scheduled meeting.

(4) An undercover operation initially authorized by the SAC must be reauthorized by a designated Assistant Director, pursuant to paragraphs IV.C-F, if it lasts longer than 12 months or involves the- expenditure of more than $40,000 ($100,000 in drug cases of which a maximum of $40,000 is for operational expenses), or such other amount that is set from time to time by the Director. No undercover operation approved at the field office level may continue for more than one year without obtaining approval at FBIHQ.

(5) An undercover operation approved by an SAC is deemed to commence on the date approved, not on the date covert activity is begun.

(6) Among the factors to be considered in a determination by any approving official of whether an undercover operation should be renewed or extended are:

(a) The extent to which the operation has produced the results anticipated when it was established;

(b) The potential for future success beyond that initially targeted;

(c) The extent to which the investigation can continue without exposing the undercover operation; and

(d) The extent to which continuation of the investigation may cause injury, financial or otherwise, to innocent parties.

H. Participation in Otherwise Illegal Activity by Undercover Employees

Except when authorized pursuant to these Guidelines, no undercover employee shall engage in

any activity that would constitute a violation of Federal, state, or local law if engaged in by a private person acting without authorization. For purposes of these Guidelines, such activity is referred to as otherwise illegal activity.

(1) Justification; No official shall recommend or approve participation by an undercover employee in otherwise illegal activity unless the participation is justified:

(a) to obtain, information or evidence necessary for the success of the investigation and not reasonably available without participation in the otherwise illegal activity;

(b) to establish or maintain credibility of a cover identity; or

(c) to prevent death or serious bodily injury.

(2) Minimization: The FBI shall take reasonable steps to minimize the participation of an undercover employee in any otherwise illegal activity.

(3) Prohibitions: An undercover employee shall not

(a) participate in any act of violence except in self-defense;

(b) initiate or instigate any plan to commit criminal acts except in accordance with Part V (Avoidance of Entrapment) below, or

(c) participate in conduct which would constitute unlawful investigative techniques (e.g., illegal wiretapping, illegal mail openings, breaking and entering, or trespass amounting to an illegal search).

(4) Self-Defense: Nothing in these Guidelines prohibits an undercover employee from taking reasonable measures of self-defense in an emergency to protect his or her own life or the lives of others against wrongful force. Such measures shall be reported to the appropriate Federal prosecutor and FBIHQ, who shall inform the Assistant Attorney General for the Criminal Division as soon as possible.

(5) Authorization:

(a) The SAC must approve all undercover operations and activities, including those which, contemplate participation in otherwise illegal activity. This approval shall constitute authorization of:

(i) otherwise illegal activity which is a misdemeanor or similar minor crime under Federal, state, or local law;

(ii) consensual monitoring, even if a crime under local law;

(iii) the purchase of stolen or contraband goods;

(iv) the delivery or sale of stolen property which cannot be traced to the rightful owner;

(v) the controlled delivery of drugs which will not enter commerce;

(vi) the payment of bribes which is not included in the sensitive circumstances;

(vii) the making of false representations to third parties in concealment of personal identity or the true ownership of a proprietary (but not any statement under oath or

the penalties of perjury, which must be authorized pursuant to subparagraph (b) below).

(b) Participation in otherwise illegal activity which is a felony or its equivalent under Federal, state, or local law requires additional authorization by the Assistant Director after review by the Undercover Review Committee. See Section IV(E).

(c) Participation in otherwise illegal activity which involves a significant risk of violence or physical injury requires authorization by the Director' or Deputy Director after review by the Undercover Review Committee. See Section IV(E).

(d) If an undercover employee believes it to be necessary and appropriate under the standards set out in subparagraph H(1) above, to participate in otherwise illegal activity that was not foreseen or anticipated, every effort should be made to consult with the SAC, who shall seek emergency interim authority from the designated Assistant Director, and review by the

Undercover Review Committee if possible, or, if necessary, may provide emergency authorization under paragraph I below. If consultation is impossible, and the undercover employee concludes that there is an immediate and grave threat to life, physical safety, or property, the undercover employee may participate in the otherwise illegal activity, so long as he does not take part in and makes every effort to prevent any act of violence. A report to the SAC shall be made as soon as possible, who shall submit a written report to FBIHQ, which shall promptly inform the Undercover Review Committee. A decision by an undercover employee to participate in otherwise illegal activity under this subsection may be retroactively authorized if appropriate.

(e) If an undercover operation results in violence in the course of criminal activity, and an undercover employee, informant, or cooperating witness has participated in any manner in the criminal activity, the SAC shall immediately inform the appropriate Federal prosecutor

and FBIHQ, which shall inform the Assistant Attorney General in charge of the Criminal Division as soon as possible.

I. Emergency Authorization

(1) In situations which require the prior written authorization of the SAC, the SAC may orally approve an undercover operation when he or she determines that a significant and unanticipated investigative opportunity would be lost were the time taken to prepare a written authorization. The required written authorization, with the justification for the oral approval included, shall be prepared promptly and forwarded to FBIHQ.

(2) Emergency interim authorization procedures are in place within FBIHQ that provide for expeditious review and authorization of a proposed undercover operation. See G.(3). If the SAC concludes that an emergency situation exists which makes even this expedited procedure too lengthy, in the following situations, the SAC may authorize the undercover operation:

(a) In situations which would otherwise require approval by the designated Assistant Director, the SAC may approve

an undercover operation when he or she determines that without immediate initiation, extension, or renewal of an operation, life, property, or personal safety of individuals would be placed in serious danger.

(b) In situations which would otherwise require approval by the Director or Deputy Director, the SAC may approve an undercover operation when he or she determines that the initiation, extension, or renewal of an operation is imperative to protect life or prevent serious injury.

Before providing authorization in these situations, the SAC shall attempt to consult with the appropriate Federal prosecutor and with a designated Assistant Director.

(3) The power to provide emergency authorizations under subparagraph (2) may not be delegated pursuant to IV.B(3).

(4) In situations arising under subparagraph (2), a written, application for approval must be submitted to FBIHQ within 48 hours after the operation has been initiated, extended,

or renewed, together with the initial finding and a written description of the emergency situation. As soon as it is notified of an emergency authorization, FBIHQ shall notify the DOJ members of the Undercover Review Committee. If the subsequent written application for approval is denied, a full report of all activity undertaken during the course of the operation must be submitted to the Director, who shall inform the Deputy Attorney General.

V. PROTECTING INNOCENT PARTIES AGAINST ENTRAPMENT

A. Entrapment

Entrapment must be scrupulously avoided. Entrapment occurs when the Government implants in the mind of a person who is not otherwise disposed to commit the offense the disposition to commit the offense and then induces the commission of that offense in order to prosecute.

B. Authorization Requirements

In addition to the legal prohibition on entrapment, additional restrictions limit FBI undercover activity to ensure, insofar as it is possible, that entrapment issues do not adversely affect criminal prosecutions. As a

result, no undercover activity involving an inducement to an individual to engage in crime shall be authorized unless the approving official is satisfied that --

(1) The illegal nature of the activity is reasonably clear to potential subjects; and

(2) The nature of any inducement offered is justifiable in view of the character of the illegal transaction in which the individual is invited to engage; and

(3) There is a reasonable expectation that offering the inducement will reveal illegal activities; and

(4) One of the two following limitations is met:

(i) There is reasonable indication that the subject is engaging, has engaged, or is likely to engage in the illegal activity proposed or in similar illegal conduct; or,

(ii) The opportunity for illegal activity has been

structured so that there is reason to believe that any persons drawn to the opportunity, or brought to it, are predisposed, to engage in the contemplated illegal conduct.

C. **Exception**

The alternative requirements of subparagraph B(4), while not required by law, are imposed to ensure that the Government does not offer inducements to engage in crime to persons who are not predisposed to do so. These standards can be waived only by the Director upon a written finding that the activities are necessary to protect life or prevent other serious harm.

VI. MONITORING AND CONTROL OF UNDERCOVER OPERATIONS

A. Preparation of Undercover Employees, Informants, and Cooperating Witnesses

(1) Prior to the investigation, the SAC or a designated Supervisory Special Agent shall review with each undercover employee the conduct that the undercover employee is expected: to undertake and other conduct that may

be necessary during the investigation. The SAC or Agent shall discuss with each undercover employee any of the sensitive or fiscal circumstances specified in paragraphs IV.C(1) or (2) that are reasonably likely to occur.

(2) Each undercover employee shall be instructed that he or she shall not participate in any act of violence; initiate or instigate any plan to commit criminal acts; use unlawful investigative techniques to obtain information or evidence; or engage in any conduct that would violate restrictions on investigative techniques or FBI conduct contained in the Attorney General's Guidelines or departmental policy; and that, except in an emergency situation as set out in paragraph IV.H.(5)(d), he or she shall not participate in any illegal activity for which authorization has not been obtained under these Guidelines. The undercover employee shall be instructed in the law of entrapment. When an undercover employee learns that persons under investigation intend to commit a violent crime, he or she shall try to discourage the violence.

B. <u>Review of Conduct</u>

From time to time, during the course of the undercover operation, the SAC shall

review the conduct of the undercover employee(s) and others participating in the undercover operation, including any proposed or reasonable foreseeable conduct for the remainder of the investigation. Any findings of impermissible conduct shall be discussed with the individual, promptly reported to the designated Assistant Director and the members of the Undercover Review Committee, and a determination shall be made as to whether the individual should continue his or her participation in the investigation.

C. **Continuing Consultation with the Appropriate Federal Prosecutor**

Upon initiating and throughout the course of any undercover operation, the SAC or a designated Supervisory Special Agent shall consult on a continuing basis with the appropriate Federal prosecutor, particularly with respect to the propriety of the operation and the legal sufficiency and quality of evidence that is being produced by the activity.

D. Serious Legal, Ethical, Prosecutive, or Departmental Policy Questions, and Previously Unforeseen Sensitive Circumstances

(1) The SAC shall consult with the chairman of the Criminal Undercover Operations Review Committee, FBIHQ whenever a serious legal, ethical, prosecutive, or departmental policy question arises in any undercover operation or if sensitive circumstances occur that were not anticipated. The FBI shall consult with the United States Attorney, or Assistant Attorney General, or their representative, and with DOJ members of the Undercover Review Committee on whether to modify, suspend, or terminate the investigation related to such issues.

(2) When unforeseen sensitive circumstances arise, the SAC shall submit a written application to FBIHQ for authorization of an undercover operation previously approved at the field office level, or amend the existing application to FBIHQ pursuant to paragraph IV.F.

E. Annual Report of the Undercover Review Committee

(1) The Undercover Review Committee shall retain a file of all

applications for approval of undercover operations submitted to it, together with a written record of the Committee's action on the application and any ultimate disposition by the approving official. The FBI shall also prepare a short summary of each undercover operation recommended for approval by the Committee. These records and summaries shall be available for inspection by a designee of the Associate or Deputy Attorney General as appropriate and of the Assistant Attorney General in charge of the Criminal Division.

(2) On an annual basis, the Committee shall submit to the Director, the Attorney General, the Associate or Deputy Attorney General, and the Assistant Attorney General in charge of the Criminal Division a written report summarizing:

(a) the types of undercover operations approved and disapproved together with the reasons for disapproval;

(b) the major issues addressed by the Committee in reviewing applications and how they were resolved; and

(c) any significant modifications to the operations recommended by the Committee.

F. Deposit of Proceeds; Liquidation of Proprietaries

As soon as the proceeds from any undercover operation are no longer necessary for the conduct of the activity, the remaining proceeds shall be deposited in the Treasury of the United States as miscellaneous receipts.

Whenever a proprietary with a net value over the amount specified by the Department of Justice Appropriation Authorization Act or other applicable laws is to be liquidated, sold, or otherwise disposed of, the FBI shall report the circumstances to the Attorney General and the Comptroller General. The proceeds of the liquidation, sale, or the disposition, after obligations are met, shall be deposited in the Treasury of the United States as miscellaneous receipts.

VII. RESERVATION

These Guidelines are set forth solely for the purpose of internal DOJ guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or

procedural, enforceable by law by any party in any matter, civil or criminal, nor do they place any limitations on otherwise lawful investigative or litigative prerogatives of the Department of Justice.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA CHARLOTTE DIVISION

FRED SUTER, TERRY D. SUTER, GREEN MEADOWS, LLC, PAULA TOTHEROW, DONNA L. HELMS, STEPHEN MILLER, HILDA A. TOTHEROW, GINNY BLANKENSHIP, ARTHUR HELMS, III, WILLIAM E. FOWLER, CAROLYN FOWLER, SIDNEY A. LIVINGSTON, EUGENE ROYALS, DENNIS GRUBAUGH, DEBORAH GRUBAUGH, JAMES KOENIG, MICHELLE KOENIG, DAN E. HOLMAN, FRANKIE EDMUNDSON, FRANK GOODMAN, ANGELO ANTONUCCI, DR. MARSHALL S. REDDING, G. DOUGLAS HAYDEN, JR., CLAUDE G. CRISP, STEPHEN M. SCHWARTZ, ALMA B. SCHWARTZ, DALE C. PETERS,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

Civil Action No. _____

JURY TRIAL DEMANDED

COMPLAINT

COME the Plaintiffs, by and through their counsel of record, and respectfully complain of the Defendant as follows.

INTRODUCTION

1. This action is related to that of *Fred Suter, et al., vs. Albert Esposito, et al,* W.D.N.C. No. 3:03CV352-V, filed in July of 2003. In that action, the Plaintiffs have asserted claims against a variety of individual and corporate entities for a massive fraud and Ponzi scheme inflicted by those parties against them. A copy of the Complaint in that action is attached hereto. ("Exhibit A"). The Plaintiffs in this action are the same as those in the aforesaid related action.

2. This action is related to the aforesaid action in that the participants in that criminal scheme included among their members a special agent of the Federal Bureau of Investigation. As shown more fully herein, that special agent, with the connivance and approval of the FBI, protected and assisted in the fraud against the Plaintiffs, adding to the extent of the injury thereby inflicted and even profiting financially from his guilty participation.

3. As shown more fully herein, the wrongful actions of that agent were performed within the scope of his employment as an employee and agent of the FBI.

FORMAL DEMAND UNDER THE FEDERAL TORT CLAIMS ACT

4. Pursuant to the requirements for asserting a claim in tort against an agency of the United States government, codified at 28 U.S.C. § 2775(a), Plaintiffs made formal written demand on the FBI on or about July 10, 2003. That demand detailed the facts as were known to the Plaintiffs at the time and made the demands which are now asserted in this case. (Copy attached as "Exhibit B").

5. On or about March 12, 2004, the FBI replied in a letter to Plaintiffs' counsel denying Plaintiffs' demand for relief and denying all responsibility for the actions complained of in their demand. (Copy attached as "Exhibit C").

JURISDICTION

6. Exclusive jurisdiction is conferred on this Court by 28 U.S.C. § 1346(b), in that the Plaintiffs have stated causes of action arising under the Federal Tort Claims Act, 28 U.S.C. § 2671 - § 2680 and fully complied with the requirements of that Act.

7. Jurisdiction over any other federal causes of action which Plaintiffs may have is conferred on this Court by 28 U.S.C. § 1331, in that such causes of action would arise under federal law.

8. Pendent jurisdiction over Plaintiffs' claims arising under the common law and statutes of North Carolina, and over claims if any arising under

the law of other states, is conferred on this Court by the Supplementary Jurisdiction provisions of the United States Judicial Code, 28 U.S.C. § 1367(a), in that Plaintiffs' common law claims are so related to the federal claims in this action that they form part of the same case and controversy.

VENUE

9. Venue lies in this judicial district pursuant to 28 U.S.C. § 1402(b), in that most of the Plaintiffs reside in this district. Furthermore, most of the acts complained of herein took place in this district.

PLAINTIFFS

10. Mr. Fred Suter is a citizen of the State of North Carolina, residing in Washington County at 5723 Shore Drive, Creswell, North Carolina.

11. Mrs. Terry D. Suter is a citizen of the State of North Carolina, residing in Washington County, 5723 Shore Drive, Creswell, North Carolina. Mrs. Suter is the wife of Fred Suter. Mr. Suter and his wife Terry D. Suter lost approximately $3.2 million at the hands of the Defendants.

12. Green Meadows, LLC (sometimes hereinafter referred to as "Suter") is a Delaware limited liability corporation with its principle place of business in Wake County, North Carolina. Green Meadows is wholly-owned by Plaintiff Fred Suter, and was employed by him as a vehicle for making some of the investments at issue in this case.

13. Paula Totherow is a citizen of the State of North Carolina, and maintains an address at Post Office Box 312, Rutherfordton, North Carolina 28139-0312. Ms. Totherow lost approximately $160,000 at the hands of the Defendants.

14. Donna L. Helms is a citizen of the State of North Carolina, and maintains an address at Post Office Box 312, Rutherfordton, North Carolina 28139-0312. Ms. Helms lost approximately $16,000 at the hands of the Defendants.

15. Stephen Miller is a citizen of the State of North Carolina, and maintains an address at 12041 Spinnaker Drive, Tega Cay, South Carolina 29708. Mr. Miller lost approximately $91,000 at the hands of the Defendants.

16. Hilda A. Totherow is a citizen of the State of North Carolina, and maintains an address at 410 Archer Road, Winston-Salem, North Carolina 27106. Ms. Totherow lost approximately $534,000 at the hands of the Defendants.

17. Ginny Blankenship is a citizen of the State of North Carolina and maintains an address at 4025 Maple Shore Drive, Stallings, North Carolina. Ms. Blankenship lost approximately $35,000 at the hands of the Defendants.

18. Arthur Helms, III is a citizen of the State of North Carolina and maintains an address at 117 Franklin Drive, Mooresville, North Carolina 28115. Mr. Helms lost approximately $75,000 at the hands of the Defendants.

19. William E. Fowler and Carolyn Fowler are citizens of the State of Alabama, and maintain an address at Post Office Box 926, Beverly Road, Dothan, Alabama 36302-0926. The Fowlers lost approximately $175,000 at the hands of the Defendants.

20. Sidney A. Livingston and Mildred R. Livingston are a married couple and citizens of the State of South Carolina. They maintain an address at 1442 Hayden Road, North, South Carolina 29112. Mr. and Mrs. Livingston lost approximately $73,000 at the hands of the Defendants.

21. Eugene Royals is a citizen of the State of South Carolina, and maintains an address at Post Office Box 3131, Myrtle Beach, South Carolina 29578-3131. Mr. Royals lost approximately $160,000 at the hands of the Defendants.

22. Dennis Grubaugh and Deborah Grubaugh are citizens of the State of Illinois, and maintain an address at 801 West Lincoln Avenue, Charleston, Illinois 61920. Mr. and Mrs. Grubaugh lost approximately $205,375 at the hands of the Defendants.

23. James and Michelle Koenig are a married couple and citizens of the State of Ohio. They maintain an address at 904 Martin Road Mogadove, Ohio 44260. Mr. and Mrs. Koenig lost approximately $70,000 at the hands of the Defendants.

24. Dan E. Holman is a citizen of the State of North Carolina, and maintains an address at 443 Briarwood Drive, Rutherfordton, North Carolina 28139. Mr. Holman lost approximately $104,040.78 at the hands of the Defendants.

25. Frankie Edmundson is a citizen of the State of North Carolina and maintains an address at 325 South Broad Street, Edenton, North Carolina 27932. Mr. Edmundson lost approximately $212,875 at the hands of the Defendants.

26. Frank Goodman is a citizen of the State of North Carolina and maintains an address at 1804 Park Road East, Salisbury, North Carolina 28144. Mr. Goodman lost approximately $110,000 at the hands of the Defendants.

27. Angelo Antonucci is a citizen of the State of North Carolina and maintains an address at 1243 Links Road, Surfside Beach, South Carolina 29575. Mr. Antonucci lost approximately $120,000 at the hands of the Defendants.

28. Dr. Marshall S. Redding is a citizen of the State of North Carolina and maintains an address at 914 Riverside Avenue, Elizabeth City, North Carolina 27909. Dr. Redding lost approximately $244,500 at the hands of the Defendants.

29. G. Douglas Hayden, Jr. is a citizen of the State of North Carolina and maintains an address at 9404 Sir Barry Drive, Richmond, Virginia

23229-3933. Mr. Hayden lost approximately $110,000 at the hands of the Defendants.

30. Claude G. Crisp is a citizen of the State of North Carolina and maintains an address at 209 North Clay Street, Lowell, North Carolina 28098-1310. Mr. Crisp lost approximately $150,000 at the hands of the Defendants.

31. Stephen M. and Alma B. Schwartz are a married couple and citizens of the State of North Carolina. They maintain an address at 36 Westminster Drive, Lancaster, Pennsylvania 17601-1451. Mr. and Mrs. Schwartz lost approximately $229,000 at the hands of the Defendants.

32. Dale C. Peters is a citizen of the State of Alabama and maintains an address at 200 Sweetwater, Apartment C 42, Dothan, Alabama 36305. Ms. Peters lost approximately $20,000 at the hands of the Defendants.

FACTUAL BACKGROUND

33. From 1998 through late 2001 or later, various individual and corporate parties conducted a massive fraud upon hundreds of investors. The fraud consisted of a well-organized program of religious affinity fraud, appealing to its victims' feeling of compatibility with a religious organization and their desire for financial security. Many of these criminal defrauders have been investigated and successfully indicted by the Federal Bureau of Investigation.

34. The fraudulent Esposito scheme obtained the Plaintiffs' money by false pretenses and fraudulent investment representations and promises. The conduct of the criminal conspirators was in violation of numerous federal criminal statutes, including, *inter alia,* 18 U.S.C. § 1341 (mail fraud), 18 U.S.C. § 1343 (wire fraud), 18 U.S.C. § 1956 (money laundering), and 18 U.S.C. § 1957 (monetary transactions with criminally-derived property).

35. The primary actors in this program of fraud included Albert Esposito, the leader of the criminal conspiracy, and a host of other individuals and associated corporate and other entities, collectively referred to herein as "the Esposito Organization."

36. The unlawful activities of the Esposito Organization were discovered and investigated by the Federal Bureau of Investigation, leading to indictments of a number of the key conspirators.

37. The essence of the Esposito Organization's operation was a Ponzi Scheme, in which the conspirators made numerous false promises to secure investors' funds, employing the funds of later victims to ward off questions by earlier investors.[1] The conspirators promised the Plaintiffs

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[1] A "Ponzi" scheme is an investment swindle in which some investors are paid off with money put up by other investors, to encourage more investments. In a Ponzi scheme, using some victim money to pay off other victims is essential to promote the scheme by lulling some victims and persuading others that there are satisfied customers. Payments made to

secure overseas investments which would earn returns between 4% and 8% per month. The purported investments included gold bullion and gold companies, aviation, real estate holdings, and various other investments.

38. In fact, the Plaintiffs' money was never invested, but rather was used, for the most part, simply to line the pockets of the principal conspirators, with which they purchased houses, vehicles, airplanes, and various incidents of a financially irresponsible lifestyle. The Esposito Organization's only known business was the operation of the fraudulent investment scheme described in this and related actions, and the Esposito Organization and its principals never made any legitimate investments on behalf of their purported clients.

39. Unfortunately, the FBI itself, as part of its undercover operation, participated in the very frauds which it was investigating. This participation went far beyond merely failing to disclose to the victims what it knew about the fraud. Rather, as shown more fully herein, an agent of the FBI assisted the criminals by helping them to conceal and perpetuate their frauds, which actions drastically extended the scope of the injury inflicted and the number of victims injured.

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investors from other investors in order to prevent discovery, renew confidence in the investment strategy, and encourage additional investments are sometimes referred to as "lulling payments."

40. This federal agent, and on information and belief the FBI itself, thereby profited financially from the agent's participation in the crimes which he was investigating.

JOHN VEGA, THE OFFICIAL AGENT OF THE FEDERAL BUREAU OF INVESTIGATION

41. John Vega is single man and a resident of Ft. Lauderdale, Broward County, Florida. Vega is, and was at all times relevant to this action, regularly employed as an agent of the Federal Bureau of Investigation. His actions, as complained of in this action, were performed in part within this judicial district.

42. As an agent of the Federal Bureau of Investigation, Vega acted as an undercover investigator for the FBI in its investigation and prosecution of the Esposito Organization and its principals. Vega's work as an FBI agent made him fully aware at all times of the true purpose and operations of the Esposito Organization.

43. Despite that knowledge, Vega actively participated in the frauds perpetrated by the criminal Esposito Organization. This included participation in at least the following entities and activities within the Esposito Organization.

Agent Vega's Participation in Southtech Holdings, Inc.

44. One of the constituent entities making up the criminal scheme known as the Esposito

Organization was Southtech Holdings, Inc. Southtech Holdings is an entity wholly owned and controlled by the Esposito Organization or by certain of its members.

45. Southtech Holdings was formed by certain members of the Esposito Organization for the purpose of effecting a stock-for-debt merger scam, in which various creditors of, and claimants against, the Esposito Organization were offered an equity ownership in Southtech, in return for the liquidation of their claims against the conspirators generally. The conspirators' purpose in putting together the Southtech Holdings entity was to avoid paying their legitimate creditors and to avoid making restitution to the victimized investors of their corrupt criminal schemes.

46. Vega helped to form Southtech Holdings, Inc. and served as its chief operating officer.

47. On information and belief, Vega contributed to the initial start-up capital of Southtech Holding, while being fully aware of its criminal purposes.

Agent Vega's Participation in the Caribbean Merchants' Bank.

48. Another of the constituent entities making up the Esposito Organization was the Caribbean Merchants' Bank. The Caribbean Merchants' Bank is a corporation organized under the laws of Grenada and which maintains, or

maintained, a place of business in Union County, North Carolina.

49. The Caribbean Merchants' Bank was formed by chief criminal conspirator Esposito, and certain other participants in his fraudulent schemes, to receive funds solicited from investors for the ostensible purpose of making off-shore investments, but actually stolen from them by the conspirators.

50. FBI agent Vega assisted conspirator Esposito in the formation of the Caribbean Merchants' Bank.

Other Activities Of FBI Agent Vega In Support of The Esposito Organization's Criminal Schemes

51. Agent Vega helped to maintain Esposito's corporate office in Ft. Lauderdale, Florida, and to bring in money from a number of victim-investors from around the world.

52. Vega also worked with Esposito to launder money from an unknown source in Ft. Lauderdale, this money amounting to hundreds of thousands of dollars.

The Financial Profit Realized By FBI Agent Vega

53. At all times germane to the actions complained of herein, Vega was fully aware of the true purpose and operations of the Esposito Organization. Whatever his investigatory duties as

an agent of the Federal Bureau of Investigation, Mr. Vega stepped way over the line in the degree of his participation in the criminal Esposito Organization, becoming a part of the very criminal conspiracy which he was appointed to investigate.

54. On information and belief, Vega's employer, the Federal Bureau of Investigation, was aware of the role Vega was playing within the Esposito Organization, and of the extend of his participation in its crimes.

55. Agent Vega was a financial beneficiary of the Esposito Organization's schemes, profiting handsomely from the Organization's crimes. He is, or was, a 10% owner of Southtech Holdings, Inc. In addition, Agent Vega owns a 68-foot yacht, about $500,000 in cash held at the Suntrust bank, and an apartment building in New York. On information and belief, these assets were derived from Agent Vega's participation in the Esposito Organization's crimes.

CAUSES OF ACTION

COUNT ONE
Fraud and Aiding and Abetting Fraud

56. Plaintiffs restate and allege fully herein the preceding allegations of this Complaint.

57. During the course of his actions as described herein, FBI Agent John Vega made various statements of fact, which statements were false, and which he knew at the time to be false, to

the Plaintiffs for the purpose of inducing their investment in the Esposito Organization.

58. Vega also made various promises to the Plaintiffs, including that the money he helped to collect from them was being used to make legitimate investments on their behalf.

59. The Plaintiffs justifiably relied on Vega's statements, having been induced to rely on the Esposito Organization and all who were associated with it.

60. The actions of Vega therefore constituted common law fraud.

61. Vega also assisted the Esposito Organization in various ways, as shown herein, including helping to form various entities within the Esposito Organization and to operate those entities once formed.

62. Vega therefore aided and abetted the various frauds committed by the other principals in the Esposito Organization.

63. The Federal Bureau of Investigation is primarily liable to the Plaintiffs as a direct and knowing participant in agent Vega's wrongful actions.

64. The Federal Bureau of Investigation is also liable secondarily as an employer of agent Vega under the common law doctrine of respondeat superior.

COUNT TWO
Negligence

65. Plaintiffs restate and allege fully herein the preceding allegations of this Complaint.

66. Agent Vega is liable to the Plaintiffs for negligence, in that in the course of his duties as a criminal investigatory agent he failed to exercise due care to avoid unnecessary harm to the Plaintiffs as investors in the Esposito Organization.

67. The Federal Bureau of Investigation is primarily liable to the Plaintiffs in that it failed to exercise due care in hiring agent Vega and in supervising his activities.

68. The Federal Bureau of Investigation is also liable secondarily as an employer of agent Vega under the common law doctrine of respondeat superior.

LIABILITY OF THE UNITED STATES UNDER THE FEDERAL TORT CLAIMS ACT

69. Plaintiffs restate and allege fully herein the preceding allegations of this Complaint.

70. By operation of law, pursuant to 28 U.S.C. § 2674, the United States has waived its sovereign immunity and is liable for the wrongful actions of its agency, the Federal Bureau of Investigation, and of its agent John Vega.

WHEREFORE, Plaintiffs demand judgment against the United States, praying for the following relief:

(a) Damages as proven at trial;

(b) The costs of this action;

(c) The attorneys' fees which the Plaintiffs have incurred and will incur in the prosecution of this action; and

(d) Such other and further relief as the Court deems just and equitable under the circumstances of the case.

PLAINTIFFS REQUEST A JURY TRIAL OF ALL ISSUES WHICH A JURY MAY HEAR IN THIS CASE.

Dated: July 15, 2004

John F. Hanzel, Esquire
Attorney for the Plaintiffs
N.C. State Bar No. 6186

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1. **Jurisdiction - Title 28 U.S.C. § 1346(b)**

Sec. 1346. - United States as defendant

(b)(1) Subject to the provisions of chapter 171 [Tort Claims Procedure] . . . the district courts . . . , shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

2. **Federal Tort Claims Act - Title 28 U.S.C. § 2674**

Sec. 2674. - Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

. . . .

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

. . . .

3. Federal Tort Claims Act - Title 28 U.S.C. § 2680(a), (h)

Sec. 2680. - Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to -

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

. . . .

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel,

slander, misrepresentation, deceit, or interference with contract rights: Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

. . . .